Burns International Security Services *and* United Government Security Officers of America, Local 15. Cases 1–CA–31617 and 1–CA–31780

September 29, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 30, 1996, Administrative Law Judge Judith A. Dowd issued the attached decision. The Respondent, General Counsel, and the Charging Party filed exceptions and supporting briefs, the Respondent and the Union each filed answering briefs, and the Respondent filed a reply brief in support of its exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In view of our finding, in agreement with the judge, that the employees went on strike on March 9, 1994, at least in part to protest the Respondent's unlawful discontinuance of holiday pay to employees on workers' compensation, we find it unnecessary to pass on the General Counsel's and Charging Party's exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(3) and (1) by failing to reinstate John Lake as a security guard. We note that, in initial colloquy before the judge, counsel for the General Counsel announced that Lake and the Respondent had ''composed their differences'' with a monetary settlement and that the General Counsel was ''not looking for any remedies'' for Lake, but rather was litigating the refusal-to-reinstate allegation solely as part of his proof that the strike was an unfair labor practice strike.

Also, in adopting the judge's findings, we do not rely on her suggestion that the Union's failure to file an unfair labor practice charge over the holiday pay matter until after the strike was concluded ''weighs against the finding of an unfair labor practice strike.'' The employees may legitimately choose to protest an unfair labor practice by calling a lawful strike rather than filing an unfair labor practice charge, and the Board will not draw any adverse inference from the employees' exercise of this legitimate form of protest.

Nor do we rely on the judge's statement that ''the plain language of the [holiday pay] clause excludes employees on workers' compensation from eligibility for holiday pay.'' That clause states that, to be eligible, a regular full-time employee, ''must fully complete his last regularly scheduled work day before the holiday itself and first regularly scheduled work day after the aforesaid holidays [sic].'' The plain language of this clause does *not* categorically preclude an employee on workers' compensation from fulfilling the stated eligibility requirements. To be sure, past practice would suggest that employees on workers compensation were *not* clearly excluded.

In view of the fact that the Respondent rejected the striking employees' unconditional offer to return to work, the 5-day period for the commencement of backpay serves no useful purpose. Accordingly, we amend the remedy section of the judge's decision to reflect that backpay will commence as of the date of the unconditional offer. See *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Burns International Security Services, Rowe, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HIGGINS, concurring.

Although I agree with the result, I wish to note that the result is not inconsistent with *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993) (*USPS*). In that case, there was no past practice, and unilateral employer action was privileged by the management-rights clause of the contract. In the instant case, there was a clear past practice of granting holiday pay to employees on workers' compensation, and the Respondent unilaterally changed that past practice.

The contract does not clearly cover the precise point. It provides that regular full-time employees must complete their last regularly scheduled workday before the holiday, and must complete the first such workday after the holiday. The contract is silent with respect to employees on workers' compensation, whose regularly scheduled workdays may be long before and after the holiday. Thus, there is arguably an ambiguity with respect to whether these employees must meet the ''work before and after'' requirement. But, even if the contract were read to confine holiday pay to employees who are currently working, that would not change the result. The issue is not whether the Respondent has offended the contract, but whether the Respondent can change the past practice without bargaining. Unlike the situation in *USPS*, there is nothing in the contract (either through ''waiver'' analysis or through ''contract coverage'' analysis) which gives that privilege.

Thus, as the judge correctly found, there is simply no basis for concluding that the holiday pay provisions or the ''waiver'' provision were intended to permit unilateral action. In my view, if there is a clear past practice that is at variance with the contract, the employer must bargain about changing that past practice, absent a clause which privileges unilateral action. See my dissent in *Midwest Power Systems*, 323 NLRB 404 (1997). That, in a nutshell, is this case because there is no such clause here. And, that is why our decision here is consistent with *NLRB v. Postal Service*.

John Firenze, Esq., for the General Counsel.
Jay M. Presser, Esq. and *Jeffrey C. Hummel, Esq.*, of Springfield, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

JUDITH A. DOWD, Administrative Law Judge. This case was heard in Greenfield, Massachusetts, on September 19 and 20, 1995. The charge in Case 1–CA–31617 was filed by United Government Security Officers of America, Local 15 (the Union) on April 21, 1994, and a complaint issued on March 31, 1995, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by, on or about November 25, 1993, unilaterally eliminating holiday pay for employees receiving workers' compensation. The complaint further alleges that certain employees of the Respondent engaged in a strike commencing March 9, 1994, to protest the Respondent's unfair labor practices, that the strikers made an unconditional offer to return to work on or about April 1, 1994, and that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate the strikers. The original charge in Case 1–CA–31780 was filed by the Union on June 8, 1994. A complaint issued August 1, 1994, alleging that Burns International Security Services (the Respondent or Burns) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by, on or about December 23, 1993, refusing to requalify employee John Lake for unescorted access to the Yankee Rowe facility and failing to rehire him as a security guard. By order dated March 31, 1995, the Regional Director for Region 1 consolidated Cases 1–CA–31617 and 1–CA–31780 for hearing. The Respondent filed answers in each of the cases denying that it committed any unfair labor practices. On September 8, 1995, the Respondent filed an amended answer restating its denial of the commission of unfair labor practices and raising certain affirmative defenses.

On the entire record, including my observation of the demeanor of the witness and after consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation which maintains an office and place of business at the Yankee Atomic Electric Services facility in Rowe, Massachusetts, where it is engaged in providing security guard services for the facility. In conducting its business, the Respondent annually performs services valued in excess of $50,000 in States other than the Commonwealth of Massachusetts. The complaint alleges, the Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Unilateral Change*

1. Background

Yankee Atomic Electric Services owns a nuclear power plant in Rowe, Massachusetts (Yankee Rowe).[1] In 1988, the Respondent successfully bid for the security contract at Yankee Rowe. The Respondent hired its predecessor's guard work force, recognized their Union, Independent Security Union, Local 1 (Local 1), and entered into successive collective-bargaining agreements with Local 1. In the fall of 1993, Local 1 became affiliated with United Government Security Officers of America. The Respondent continued to honor the terms of the then-current collective-bargaining agreement which was effective from January 23, 1991, to December 10, 1993. There were about 20 security guards in the bargaining unit at the time that the contract expired.

On December 7, 1993, the parties began bargaining for a new contract. Over the course of 3 days, the parties reached agreement on all contract terms subject to approval by the membership. On December 20, the Union's president, Vincent D'Amico, conducted a membership meeting. Many of the members spoke against the contract because it contained a number of concessions. At the conclusion of the meeting, the membership voted to reject the proposed contract.

2. The discontinuance of holiday pay to employees on workers' compensation

For a number of years, the Respondent paid holiday pay to employees who were out on workers' compensation. Sometime in late 1993, the Respondent discovered that it was not required by state law to do so. The Respondent did not pay employees on workers' compensation leave for the 1993 Thanksgiving holiday. On December 10, George Raposa, the Respondent's project manager at the Yankee Rowe facility, prepared a letter to the three employees who were out on workers' compensation at the time. Raposa did not mail the letter until around December 23. The letter, signed by Raposa, states, in pertinent part, as follows:

> Further investigation of Massachusetts state statutes and Worker's Compensation law has been conducted. It was determined that we, Burns International Security Services, Inc., are not required to compensate employees on Worker's Compensation for holidays or vacation time in addition to benefits paid by the insurance company. Further review of the contract with the local union shows no negotiated benefit required by contract. Therefore, *all payment for holidays and vacation time will cease immediately*. [Emphasis in original.]

Sometime in early January 1994, the president of the Union, Vincent D'Amico, learned about the discontinuance of holiday pay when one of the affected employees showed him a copy of Raposa's letter.

[1] For more than 2 years Yankee Rowe has not been producing electricity but the plant still contains atomic fuel and it is carrying out a long-term dismantlement plan.

3. Discussion and conclusions

The Respondent acknowledges that it discontinued holiday pay for employees on workers' compensation without affording the Union notice and an opportunity to bargain.[2] At the hearing, the Respondent raised no contention that holiday pay for employees on workers' compensation is a nonmandatory bargaining subject and I find that it is a mandatory subject. See *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958) (the Act treats as mandatory bargaining subjects any feature of the employee-employer relationship which affects ''wages, hours of work or other terms and conditions of employment''). The Respondent denies that it violated the Act and asserts that its actions were permissible under certain terms of the collective-bargaining agreement, including a so-called zipper clause.

Section 8(a)(5) makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of his employees.'' Section 8(d) of the Act defines this bargaining obligation as requiring the union and employer ''to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.''

The right to bargain of Section 8(a)(5) is a statutory right, not a contract right. To establish waiver of a statutory right, the Supreme Court has stated: ''[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated.'' *Metropolitan Edison Co*., 460 U.S. 693, 708 (1983). In the absence of specific language indicating a waiver, a waiver may nonetheless be shown when the history of prior contract negotiations demonstrates that the subject was discussed and consciously yielded. *Columbus Electric Co*., 270 NLRB 686 (1984).

The waiver or zipper clause in the parties' collective-bargaining agreement states as follows (art. XXVIII):

> *WAIVER*
>
> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

The above-quoted zipper clause is general in character and contains no language that suggests that by agreeing to this provision, Local 1 was waiving the right to bargain over holiday pay for employees on workers' compensation. There is also no record evidence showing that the issue of holiday pay for employees on workers' compensation was discussed and consciously yielded by Local 1 during contract negotiations. Rather, uncontradicted evidence shows that the Respondent paid holiday pay to its employees receiving workers' compensation benefits throughout most of the life of the contract, until Thanksgiving 1993. Under these circumstances, a generalized zipper clause in the parties' collective-bargaining agreement does not constitute a union waiver of the right to notice and an opportunity to bargain before the employer effectuates a change in working conditions. See *Ohio Power Co*., 317 NLRB 135 (1995); *Murphy Oil USA*, 286 NLRB 1039 (1987); and *Rockwell International Corp*., 260 NLRB 1346 (1982).

The Respondent also argues in its brief that the management-rights clause (art. II) and the holidays clause (art. XV), read together, permit discontinuance of holiday pay to employees on workers' compensation. There is nothing in the general language of the management-rights clause that would indicate that the parties intended to allow the Respondent the right to discontinue holiday pay for employees on workers' compensation without affording the Union notice and the opportunity to bargain.[3] See *Southern California Edison Co*., 284 NLRB 1201, 1211–1212(1987); *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985); and *Kansas National Education Assn*., 275 NLRB 638, 639 (1985).

The holidays clause contains some general eligibility requirements for holiday pay, such as having the status of a ''regular full-time employee'' assigned to a 40-hour workweek and working the day before and the day after a holiday. Employees on workers' compensation leave are not specifically mentioned in the Holidays clause. Moreover, the plain language of the clause excludes employees on workers' compensation from eligibility for holiday pay. Regardless of this eligibility language, however, the Respondent, as noted above, paid holiday pay to employees on workers' compensation leave until Thanksgiving 1993. The Respondent admittedly made these payments for the extra-contractual reason that it believed it was obligated to do so under state workers' compensation laws. The eligibility language of the holidays clause of the contract is therefore irrelevant with re-

[2] Regardless of its admission that it failed to give the Union notice and an opportunity to bargain, the Respondent cites in its brief the testimony of the Respondent's witness, George Raposa, to the effect that he showed a draft of his letter announcing the discontinuance of holiday pay to the Union's vice president, Steven Wheeler, prior to mailing the letter to the affected employees. Even accepting Raposa's testimony as true, his actions in showing the letter to the Union's vice president do not constitute proper notice and opportunity to bargain, since the Respondent admittedly had already failed to pay holiday pay for Thanksgiving. The discontinuance of holiday pay to employees on workers' compensation was already a fait accompli by the time Raposa drafted his letter on December 10. See *S & I Transportation*, 311 NLRB 1388 (1993).

[3] The management-rights clause reads, in pertinent part, as follows:

> This Agreement shall not be construed to infringe or impair any of the normal management rights of the Employer which are not inconsistent with the provisions of this Agreement. Included among management rights is the right to change existing business practices. . . . The right of the Employer to make rules and regulations not in conflict with this Agreement as it may, from time to time, deem best for the purpose of maintaining order, safety and/or effective operations, and after advance notice thereof to the Union and to the employees, to require compliance therewith by employees is recognized.

spect to right of employees on workers' compensation to receive holiday pay. That right was established entirely by the Respondent's longstanding past practice.

I find that no provisions in the collective-bargaining agreement, read alone or together, justified the Respondent in discontinuing holiday pay to employees on workers' compensation leave without affording the Union notice and the opportunity to bargain. I therefore conclude that the Respondent's unilateral discontinuance of holiday pay to affected employees constituted a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. See *Johnson-Bateman Co*., 295 NLRB 180 (1989).[4]

B. *The Alleged Unlawful Refusal to Rehire Employee John Lake*

1. Background

John Lake was hired as a guard at Yankee Rowe in 1986. Lake was active in the Union and became its president in March 1990. In December 1990, Lake filed an unfair labor practice charge against the Respondent, alleging that he was discriminatorily suspended and placed on a 1-year probation. A non-Board adjustment of this matter was reached between the parties in the fall of 1991. Subsequently, the Respondent discharged Lake for alleged misconduct. Lake filed charges with the Board alleging that his discharge was discriminatory and that the Respondent's actions violated Section 8(a)(3) of the Act. The Board held the discharge case in abeyance pending arbitration, pursuant to *Collyer Insulated Wire Co*., 192 NLRB 837 (1971).

The arbitration hearings concerning the unlawful discharge allegation began in 1992 and continued throughout 1993. On December 10, 1993, the Respondent made a unilateral offer of reinstatement directly to Lake. This offer was conditioned on Lake requalifying for a security clearance permitting unescorted access to Yankee Rowe. Such a security clearance is necessary for employment as an armed guard at the facility. Lake had previously held the required clearance, but it had terminated during the period of his discharge.

The Nuclear Regulatory Commission (NRC) has specified certain requirements employees must meet in order to qualify for unescorted access, including psychological screening by a licensed professional, to determine if the individual suffers from any ''emotional instability that would interfere with the effective performance of assigned security duties.'' Any psychologist who performs such assessments must agree to a yearly audit by the NRC or the nuclear facility to insure that the assessments are conducted in accordance with Federal law. Since 1990, one of the individuals Yankee has used to conduct psychological assessments has been Dr. Leighton McCutchen.

2. Dr. McCutchen's psychological assessment of Lake

On December 23, 1993, the Respondent referred Lake to Dr. McCutchen for the required psychological assessment. The Respondent chose Dr. McCutchen because he had previously performed psychological testing for Yankee Rowe and had satisfied the audit requirement. It was therefore more convenient for the Respondent to use Dr. McCutchen. The Respondent had the ultimate responsibility for payment for Dr. McCutchen's assessment services.

All newly hired and rehired employees referred for psychological testing are given the Minnesota Multi-Personality Inventory-2 (MMPI-2), which is a standard test of about 550 true and false questions. Employees who are being rehired to work at Yankee Rowe are routinely required to undergo a personal interview in addition to the MMPI-2. Lake received a score of ''scale 6 T=75'' on the MMPI-2. Dr. McCutchen noted on Lake's MMPI-2 score sheet ''alienation, character problems, withdrawn, paranoid elements.''

During Dr. McCutchen's interview with Lake, the employee stated that the Respondent had to take him back regardless of the results of the psychological examination. Lake also told McCutchen, inter alia, that he would only be working until he was paid a large sum of money, that the Respondent had discriminated against him because of his union activities, and that he was not wanted back at the plant because he was an effective union official.

On December 27, 1993, Dr. McCutchen called George Raposa and told him that Lake had serious psychological problems which he felt warranted his refusal to approve Lake to work at Yankee Rowe. Dr. McCutchen then asked Raposa whether Lake had been fired because he was a union president and because he had negotiated such a favorable contract for the employees. Raposa denied that those statements were true and told McCutchen that Lake had been terminated based on evidence that he had willfully falsified information during an investigation. McCutchen then asked whether there were any monetary issues or settlements pending with Lake. Raposa told him that Lake was seeking backpay through a pending arbitration proceeding. Dr. McCutchen told Raposa that there were definite psychological problems associated with Lake and that he was not going to approve Lake for unescorted access. Dr. McCutchen indicated that he would confer with a colleague before he decided whether Lake should be evaluated by another psychologist or denied access based on his evaluation alone. The next day, Dr. McCutchen called Raposa again and told him that he had decided not to

[4] The Respondent contends in its brief that the fact that the Union's attorney, Craig Robinson, takes the same position espoused by the Respondent—that the zipper clause operated as a waiver—should compel that interpretation of the contract. Apparently, part of Robinson's willingness to concede the waiver issue is founded on his position that the unilateral change in holiday pay was not made until after the collective-bargaining agreement expired on December 10, 1993, and that the zipper clause did not survive the contract expiration. The Union's contention is correct with respect to the nonsurvival of a zipper clause. See *Ironton Publications*, 321 NLRB 1048 (1996). However, the contention has no merit with respect to the date of the original unilateral change. The complaint in Case 1–CA–31617 specifically alleges that the change in holiday pay took place on November 25, 1993, prior to the expiration of the collective-bargaining agreement. Moreover, the Respondent has admitted that it failed to pay employees on workers' compensation for the 1993 Thanksgiving holiday.

The Union offers no rationale in support of waiver other than that set out in the Respondent's brief and I have already rejected that argument. I further reject the Respondent's contention that the Board should defer to the parties' interpretation of their collective-bargaining agreement even if, as in this case, it conflicts with established Board precedents. This is particularly true on the facts presented here, since the attorney for the Union did not negotiate the parties collective-bargaining agreement and only began representing the Union after the contract had already expired.

approve Lake for unescorted access based on his own clinical interview.

Subsequently, Dr. McCutchen forwarded a two-page written ''Report of Psychological Screening Assessment'' to the Respondent. This report indicated that McCutchen had found two problem areas—''Hostility Toward Authority'' and ''Irresponsibility and Poor Judgment.'' McCutchen's report recommends that Lake ''not be considered as meeting the criteria for screening of nuclear facility personnel.'' A copy of this report was sent by Raposa to Sandra Garvie, Yankee Rowe's security manager. The final determination of whether an individual will be granted unescorted access to the plant is made by Garvie. On receipt of the report, Garvie composed a letter informing Lake that he was being denied site access because he had failed the psychological assessment. Garvie then instructed Raposa to inform Lake about the appeal process available through Yankee Rowe. Lake appealed his denial of unescorted access through the appeals procedures.

3. The issue of alleged discriminatory motivation

Under the Board's decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the burden of showing that protected conduct was a motivating factor in the employer's employment action. In order to meet this burden, the General Counsel must prove that the employee engaged in union activities, that the employer had knowledge of these activities, and that the employer undertook an adverse employment action against the employee because of union animus. As the Board has recently explained, the General Counsel's burden is one of persuasion and not merely production. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). If the General Counsel's case is established, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have take the same action if the employee had not engaged in protected activity. *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2551, 2558 (1994).

The General Counsel has established that Lake engaged in protected union activity and that Dr. McCutchen had knowledge of Lake's involvement with the Union. Assuming that Dr. McCutchen was acting as an agent of the Respondent for purposes of administering the examination, the next question is whether the General Counsel met his burden of showing that Dr. McCutchen was motivated by antiunion considerations, when he recommended that Lake should be denied unescorted access to Yankee Rowe. The General Counsel and the Union contend in their briefs that Dr. McCutchen's reliance, in part, on Lake's statements about his union activities to conclude that the employee may have a personality disorder is tantamount to union animus. In support of this contention, the General Counsel points out that the clinical interview, during which Lake talked about his union activities, is the most subjective portion of the testing process.

The greater subjectivity of the clinical interview is irrelevant without some evidence that Dr. McCutchen harbored antiunion sentiments. After carefully reviewing the record, I find no evidence that Dr. McCutchen was personally or professionally opposed to unionization. Dr. McCutchen is a psychologist and not a company manager, supervisor, or labor relations professional. He is therefore removed from the usual workplace conflicts between labor and management. As far as I can determine, Dr. McCutchen held no strong personal views either for or against unionization. I also note that there is no evidence that Yankee Rowe or the Respondent chose Dr. McCutchen to perform assessments because McCutchen was known as, or believed to be, an opponent of the Union or unionization. Dr. McCutchen had no record of disqualifying employees who demonstrated support for unionization. I also found no evidence to suggest that Dr. McCutchen had any interest in whether Lake's return to work would have adverse labor relations consequences for the Respondent. Dr. McCutchen maintained a private practice in a clinical setting and he apparently did not depend on Yankee Rowe or the Respondent for his livelihood. As far as the record reflects, Dr. McCutchen was only concerned with whether or not Lake met the testing criteria for psychological fitness for security duty at a nuclear power plant.

With respect to the content of the interview, Dr. McCutchen's ''Summary of Clinical Interview'' indicates that he uncovered three major concerns: Lake's statements about his union activities and his legal actions against the Respondent, Lake's attitude towards his then-current job as a dorm parent working with physically aggressive clients, and Lake's conflicts with his wife. Focusing only on Lake's statements about his union activities, the evidence shows that Lake himself raised this subject. It also appears from Dr. McCutchen's notes that it was not the fact that Lake engaged in union activities that caused concern. Rather, Dr. McCutchen expressed concern over the hostility and other negative psychological features Lake revealed when he described his activities. Thus, Dr. McCutchen noted that Lake expressed ''satisfaction in his apparent ability to intimidate authorities in the work place'' and that the employee claimed responsibility for having one of his supervisors fired. Lake described the arbitration settlement as a ''deal between his lawyer and Burns' attorney'' by which they had to take him back with the understanding he would stay only so long and then receive a considerable sum of money in severance or backpay. Lake claimed that the deal was made by Burns to avert a costly legal suit that Lake would ''most likely win.''

As a psychologist charged with determining whether an individual was psychologically fit for duty as an armed security guard at a nuclear power facility, Dr. McCutchen had a heavy responsibility. He could not properly ignore the indications of hostility, aggression, and grandiosity inherent in Lake's statements, regardless of the circumstances under which they may have developed. It may be that Lake has good cause for being hostile towards the Respondent and its supervisors because they discharged him for engaging in union activities. The question of whether Lake's discharge was discriminatory has never been resolved. It is also possible that Dr. McCutchen's opinion could be erroneous. No psychological testing is infallible.[5] Dr. McCutchen could

[5] In this regard, as the General Counsel points out in his brief, Lake underwent a psychological evaluation in September 1986, at the time that he was hired to work at Yankee Rowe. The psychologist who performed the 1986 assessment found no significant problems. The 1986 test results, which are in the record, are far more generalized than the detailed type of testing done by Dr. McCutchen. Even if a fair comparison could be made, however, Lake's alleged psychological problems could have developed after 1986. In any

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have placed too negative a connotation on Lake's aggressiveness, which could be viewed as an admirable quality in a labor leader. However, Dr. McCutchen was not determining Lake's suitability for union office, he was examining Lake's psychological fitness for duty as an armed security guard. Hostility and aggression could reasonably be viewed as negative personality traits in the context of armed security work at a nuclear facility.

For these reasons, I find that the General Counsel has failed to establish a prima facie case of unlawful motivation. See *Chardon Electrical & Industrial*, 302 NLRB 106, 107 (1991) (antiunion animus is not to be lightly inferred).[6]

4. The agency issue

Even if I found that the General Counsel established a prima facie case of unlawful motivation and assuming that the Respondent could not effectively rebut it, there is the further issue of whether Dr. McCutchen had an agency relationship with the Respondent.

Section 2(2) of the Act defines the term employer to include ''any person acting as an agent of an employer, directly or indirectly'' and Section 2(13) provides that ''in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.'' Rather, as the Supreme Court has stated, agency questions arising under the Act are to be determined in accordance with the ordinary common law rules of agency. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968).

Common law agency principles recognize three characteristics of an agency relationship: (1) the power of the agent to alter the legal relationships between the principal and third parties and the principal and himself; (2) the existence of a fiduciary relationship toward the principal with respect to matters within the scope of the agency; and (3) the right of the principal to control the agent's conduct with respect to the scope of the agency. Restatement 2d, *Agency* §§ 12–14 (1958). The most important of these characteristics is that the principal have the right to control the agent's conduct. The Restatement comments that ''[i]f the existence of any agency relation is not otherwise clearly shown, as where the issue is whether . . . an agency has been created, the fact that it is understood that the person acting is not to be subject to the control of the other as to the manner of performance determines that the relation is not that of agency. Restatement 2d *Agency* § 14, comment b. See also *Sable v. Mead Johnson & Co.*, 737 F.Supp. 135 (D.Mass. 1990).

The General Counsel contends in his brief that Dr. McCutchen was subject to the Respondent's control because it chose him to do the examination and paid his bill. The fact that the Respondent could choose any psychiatrist who complied with the NRC regulations to perform the evaluation, but yet chose Dr. McCutchen, does not establish control. The evidence shows that the Respondent chose Dr. McCutchen because he was already approved by Yankee Rowe and it was simpler to employ him than to find a new doctor in the area to do the examination. There is no showing that the Respondent ''hand picked'' Dr. McCutchen because he was known to have any proemployer or antiunion views.

As far as the Respondent paying for Dr. McCutchen's services, it is well settled that payment of services is not determinative of the agency issue. Dr. McCutchen was a professional licensed psychologist with his own private practice. Dr. McCutchen was not subject to the Respondent's control in the means and manner of performing the examination of individuals referred to him for evaluation. Dr. McCutchen's unchallenged testimony was that he conducted Lake's examination as he did every other examination. There is no evidence that the Respondent supplied Dr. McCutchen with any equipment, supplies, or an office, or that it set policies or guidelines for Dr. McCutchen's examinations. Where, as here, payment for services is the only indicium of control, I find that it is insufficient to establish an agency relationship.

Accordingly, I find that Dr. Leighton McCutchen was not acting as an agent of the Respondent when he conducted his assessment and recommended that John Lake not be granted unescorted access to Yankee Rowe. I therefore recommend that the charge in Case 1–CA–31780, that the Respondent failed to reinstate Lake for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act, be dismissed.

C. *The Strike*

1. The prestrike contract negotiations

After the employees rejected the Respondent's contract proposal of December 11, 1993, the Respondent's bargaining representative, Guy Thomas, wrote to the Union and stated that ''absent a new agreement, Burns is not bound by and would not recognize binding arbitration for any disputes which may arise in the grievance procedure.'' On February 3, 1994, the parties resumed contract negotiations.[7] The Union's bargaining committee was led by its attorney, Craig Robinson. The Union submitted a number of proposed changes to the expired contract which had been suggested by the membership. Guy Thomas stated that Burns stood by its last, best offer of December 11, 1993. Robinson pointed out that the membership had rejected that offer and that the members wanted some showing that the Respondent was in

event, psychologists obviously can differ in their conclusions about the psychological fitness of an individual, without raising an inference that one of them was acting for other than purely professional reasons.

[6] The General Counsel and the Union both emphasize the fact that Dr. McCutchen called Raposa prior to submitting his written recommendation denying unescorted access. I agree that this call raises concerns, particularly because Raposa denied that Lake had been fired for union activity. Since Raposa himself informed the Board investigator that he had made that statement, and he was attempting at the time to facilitate Lake's reinstatement, not thwart it, it is difficult to conclude that he was deliberately trying to influence McCutchen against Lake. However, Raposa's comment, even innocently made, could have had the effect of reinforcing McCutchen's doubts about the reliability of Lake's seemingly grandiose claims. Considering Dr. McCutchen's assessment as a whole, including his notes on the MMPI-2, Lake's health problems checklist, the mental status exam, and Dr. McCutchen's notes on the clinical interview unrelated to Lake's union activities, I find that Raposa's single statement denying that Lake was fired for being a union president and asserting that he was discharged for misconduct, was not sufficient to have tainted the assessment process.

[7] All dates hereafter are in 1994 unless otherwise indicated.

economic need of concessions. Thomas responded that Burns was not claiming inability to pay.

The parties met again on February 4, and the Union submitted proposals that were slight modifications of their proposals of the previous day. The parties discussed various contract issues but reached no agreement. Thomas asked the union representatives to make their last, best offer. Robinson responded that he thought it would be appropriate to consult with the membership before bringing a final offer to the table.

Negotiations resumed on March 7 and 8, at which time the Union presented several sets of proposals. Robinson again informed Thomas that the membership was unwilling to accept the economic concessions that the Respondent sought from them. Thomas continued to state that the Respondent had made its last, best offer on December 11, 1993, and would not move. The Union offered a new proposal concerning the procedure for selecting an arbitrator. Robinson stated that this proposal was necessary because the grievance and arbitration procedure was too slow, as demonstrated by the Lake arbitration. Thomas told Robinson that he understood the Union had contacted Yankee Rowe and asked about where certain barrels could be placed in the event of a strike. Thomas stated that he did not think that a strike was a good idea. Robinson replied ''you're not leaving us any alternative.'' The union bargaining committee then caucused and came back to the table with a revised wage proposal. The Union also offered a new proposal concerning the formation of a joint health and safety committee. After discussion of various proposals, Thomas reiterated that the Respondent had made its last, best, and final offer.

2. The strike vote

The Union held a membership meeting on March 9. The meeting lasted throughout the day and was attended by employees as their shifts ended. Robinson made essentially the same presentation to employees on each of the three shifts as they arrived. Robinson reviewed the negotiations and told the employees that the Respondent refused to improve its offer of December 11, 1993. Robinson also told the members that the Respondent had notified the Union in December that it would not arbitrate any grievances that arose after the contract expired and that therefore the Union could not arbitrate the refusal to rehire Lake. Robinson stated that the refusal to rehire was a potential unfair labor practice. Robinson also talked about the Respondent's unilateral change in benefits to employees on workers' compensation and identified it as another unfair labor practice. Robinson also referred to the Respondent's alleged failure to provide information and other concerns as possible unfair labor practices.

Robinson then explained to the membership the relative consequences of striking over purely economic issues, striking over unfair labor practices, or striking over a combination of economic issues and unfair labor practices. After Robinson's presentation, a strike vote was taken. Prior to the meeting, Robinson had prepared a ballot with four choices. The ballot gave union members the following options:

> YES—I authorize the Executive Board of UGSOA Local 15 to call a strike over the Employer's contract offer.
>
> YES—I authorize the Executive Board of UGSOA Local 15 to call a strike over the Employer's Unfair Labor Practices, including but not limited to John Lake, unilateral changes, interference with union activities.
>
> YES—I authorize the Executive Board of UGSOA Local 15 to call a strike over Employer's Unfair Labor Practices and Employer's Contract offer.
>
> NO STRIKE—Accept Employer's Contract offer and pursue Unfair Labor Charges through NLRB.

Nineteen employees—all but one member of the unit—participated in the strike vote. Eight employees voted not to strike, nine employees voted to strike because of both the contract negotiations and the Respondent's unfair labor practices, and two employees voted to strike because of the unfair labor practices alone. A strike was called that day.

During the strike, the pickets carried a number of different signs. One read ''we need to support our families,'' another stated ''Burns commits unfair labor practices[.] Unfair to John Lake,'' a third sign read ''company says no to union safety committee,'' and another said ''strike against unfair labor practices.'' Union members also distributed a flyer about the strike. The flyer states that the Union is striking over ''Burns tactics at the bargaining table and unfair conduct toward its employees.'' The flyer then sets out the issues over which the employees went on strike, beginning with a list of economic reductions sought by the Respondent. The flyer further states that the employees are also on strike because Burns committed unfair labor practices, including firing John Lake and ''unilateral changes in benefits provided injured workers.'' The flyer concludes by stating ''Local #15 members are willing to accept a wage/benefit freeze and extend the present contract for two years.''

On March 11, the Union distributed a press release to the media. The press release states that the employees are striking because of proposed reductions in wages and benefits. The press release further states:

> Local #15 members are also striking to protest company unfair labor practices including the fining (sic.) of former local president John Lake, unilateral changes in benefits paid to injured workers, interference in union activities and dilatory bargaining tactics.

A number of articles also appeared in local newspapers about the strike. One of the articles quotes the Union's president, Vincent D'Amico, as saying the strike was called because ''the company has committed unfair labor practices by fining (sic.) former Local 15 President John Lake [and] making changes in the benefits for injured workers.'' Other newspaper articles quote D'Amico as stating the strike was due to the Respondent's efforts to obtain economic concessions and other actions by Burns unrelated to any alleged unfair labor practices.

3. The offers to return to work

On March 11, 1994, Guy Thomas wrote to the Union's attorney, Craig Robinson. Thomas recited the parties' bargaining history and stated ''please be advised that an impasse has been reached. Accordingly, the Company will implement its Final Offer effective March 15, 1994.'' On March 16, Robinson wrote a reply in which he disputed some of Thomas' statements about the course of the negotiations and added that the Union had not yet placed its ''Last Best Offer'' on

the table and continued to be willing to negotiate in good faith. Near the end of his letter Robinson stated: ''I do not dispute that one of the reasons [for the strike] was to put pressure on the Employer to show some movement at the table. I have enclosed a leaflet which addresses some of the issues which led to the strike.'' Robinson enclosed a copy of the union flyer quoted above.

On March 22, the parties held another bargaining session which was attended by all of the striking employees. The Union presented and discussed a list of written proposals and a new oral proposal concerning wages. Thomas reiterated that the Respondent was not going to change its December 1993 bargaining position. Robinson asked Thomas if the Company had hired permanent replacements. Thomas informed Robinson that the Company had not yet done so, but would immediately start to hire them if the strike could not be resolved. Thomas also asked Robinson about the unfair labor practices and Robinson replied that the affidavits were ready and Thomas would learn about them. At the end of the meeting, Thomas informed Robinson that the Respondent would begin hiring permanent replacements the next day.

The members of the Union met on March 23. On that same date, D'Amico wrote a letter which was hand delivered to the Respondent. The letter states:

> This is to inform you that all employees of Burns International Security Services at the Yankee Rowe Atomic Plant are ready, willing and able to work under the terms and conditions of the expired contract pending negotiation of a new contract.

Subsequently, Thomas phoned D'Amico and told him that the Respondent had not yet hired replacements and that the employees could return to work immediately under the terms of the Respondent's final offer which it had implemented on March 15. On March 30, the members of the Union voted to end their strike. On April 1, the employees made an unconditional offer to return to work. The Respondent treated the returning employees as economic strikers.

4. Discussion and conclusions

The General Counsel and the Union contend that the strike which began on March 9, was an unfair labor practice strike. The Respondent contends that the strike was purely economic in nature and was caused by the employees' refusal to accept the economic concessions demanded by it. If the strike is an unfair labor practice strike the employees were entitled to immediate reinstatement even though replacements had been hired. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). If, however, the strike was solely an economic strike, as the Respondent contends, the employees were entitled to their jobs only as vacancies arose or when strike replacements left. *Laidlaw Corp*., 171 NLRB 1366, 1369 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

The Board has consistently held that where a strike is called for both economic and unfair labor practice reasons, the dual motivation does not deprive employees of the status of unfair labor practice strikers if the employer's unfair labor practice was a contributing factor. *Colonial Haven Nursing Home*, 218 NLRB 1007 (1975). ''Board law is firmly established that a strike is an unfair labor practice strike if the employer's unfair labor practice had anything to do with causing the strike.'' *Domsey Trading Corp*., 310 NLRB 777, 791 (1993), and cases cited. Accordingly, even if the economic or other reasons for the strike were more important than the unfair labor practice activity, the strike is still an unfair labor practice strike. Id. It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events. *John Cuneo, Inc*., 253 NLRB 1025, 1026 (1981).

In this case there is no question that a major cause of the strike was the Respondent's insistence on economic concessions from the Union. The Union called a meeting to take a strike vote on the day after contract negotiations broke down over the Respondent's unwillingness to change its offer from the one that it made on December 11, 1993. Moreover, the newspaper coverage of the strike indicates that the employees were angry over the Respondent's position that it was not claiming economic need, although it was demanding reductions in wages and benefits.

Since I have found that the Respondent's refusal to rehire Lake did not violate the Act, the only unfair labor practice that is relevant to the strike issue is the Respondent's unilateral discontinuance of holiday pay to employees on workers' compensation. The evidence shows that this unfair labor practice was discussed by the Union's attorney during the strike vote meeting. The evidence further shows that a majority of 11 of the 19 employees who cast ballots, voted either to strike over both the unfair labor practices and the contract offer or solely over the unfair labor practices, specifically including the unilateral change. During the strike, some of the picket signs publicized only the economic issues and others indicated that the strike was over unfair labor practices. The Union's press release and printed flyers generally discuss both the economic issues and the unfair labor practices, consistently including the unilateral change in benefits to injured workers. The press coverage of the strike emphasizes the economic strike issues, although the Union's president, Vincent D'Amico, is quoted in at least one article as attributing the strike to both economic issues and the unfair labor practices, including the unilateral discontinuance of benefits to employees on workers' compensation.

In short, the Respondent's unilateral discontinuance of holiday pay was discussed during the strike vote meeting and was specifically mentioned as one of the possible unfair labor practices on the strike vote ballot. The majority of the members voted to strike over both the contract issue and the unfair labor practices combined or the unfair labor practices alone. The unilateral change in benefits was also mentioned as a contributing cause of the strike in the Union's flyers and press release. Moreover, a unilateral change in benefits is an important concern to employees. Although only 3 employees out of a 20-member unit were affected by the discontinuance of holiday pay, the other employees would necessarily be concerned by the precedent it set. If the Employer could unilaterally discontinue benefits to employees receiving workers' compensation it could, by the same token, eliminate benefits that had been paid to all of the unit employees. Based on all of the evidence, I conclude that at least one of the causes of the strike was the Respondent's unilateral change in holiday pay for employees on workers' compensation.

The Respondent contends that the strike was purely economic because there was no causal relationship between the

unfair labor practice and the strike. In support of this contention, the Respondent cites the Union's failure to make a presentation to the membership about the unfair labor practice allegations until the strike vote was taken, its failure to raise unfair labor practice issues at the bargaining table, and its delay in filing Board charges until April 21, 1994, 20 days after the strike had ended. With respect to the Union's failure to raise the unfair labor practice issues at the bargaining table, the Union's attorney credibly testified that he failed to raise these issues because he feared that they would be used by the Respondent as leverage to demand further bargaining concessions. Although raising the unfair labor practices at the bargaining table would constitute additional evidence that the strike was caused in part by the unfair labor practice found, I do not find that the Union's failure to do so, on the facts in this case, compels an inference that protesting the Respondent's unfair labor practice was not a cause of the strike. The fact that the Union did not make a formal presentation to the employees about the unfair labor practices until the strike vote was taken does not impress me as a significant factor weighing against a finding of an unfair labor practice strike. Thus, for example, the lack of a formal presentation by the Union does not suggest that the employees were not discussing these issues among themselves. On the other hand, the Union's failure to file the charge alleging an unlawful unilateral change until 20 days after the strike was concluded is a factor that clearly weighs against the finding of an unfair labor practice strike. However, I find that this factor does not outweigh the evidence discussed above, showing that the unfair labor practice was one of the causes of the strike.[8]

Contrary to the Respondent, I find no evidence to suggest that the Union's attorney, Craig Robinson, was cynically attempting to clothe the strike in unfair labor practice trappings when he explained the employees' rights to them at the strike vote meeting. It was his obligation to do so. Moreover, even assuming that the Union's attorney could be accused of exploiting the strategic advantage inherent in an unfair labor practice strike, as opposed to an economic strike, that does not constitute evidence of lack of causal connection between the unfair labor practice and the strike. See *North American Coal Corp*., 289 NLRB 788, 788 fn.4 (1988).[9]

The Respondent further contends that even if the strike was caused in part by its unfair labor practice, the strike was converted to an economic strike on March 23, 1994, when the employees made a conditional offer to return to work under the terms of the expired contract, without any insistence on remedying the unfair labor practices. The cases cited by the Respondent, *General Industrial Employees Union Local 42 v. NLRB*, 951 F.2d 1308 (D.C. Cir. 1991); *Studio 44, Inc*., 284 NLRB 597, 600–602 (1987); and *Trident Seafoods Corp*., 244 NLRB 566, 569–570 (1979), do not support its position. In all of these cases, the Board found that an unfair labor practice strike was converted to an economic strike when the employer substantially remedied the unfair labor practices that had been one of the causes of the strike, thereby removing that cause and converting the strike to a purely economic action. Since the Employer here never remedied the unfair labor practice, the employees were not put to the test of whether they would continue their strike solely for economic reasons. All that is shown by the employees' conditional offer to return to work is that they were prepared to abandon their strike if their economic demands were met. Such a position merely recognizes that the employees lost the strike and not that they were abandoning any interest in the unfair labor practice issues. Obviously, the employees could still pursue the alleged unfair labor practices by filing charges with the Board.

The Respondent further contends that the strike was unprotected even if one of the causes was the unlawful unilateral change in holiday pay, since this unfair labor practice was subject to arbitration. Holiday pay for employees on workers' compensation was not a contractual benefit but one established by past practice. There is at least some question, therefore, whether this dispute was even arbitrable. Assuming, arguendo, however, that the holiday pay issue was subject to arbitration, the Respondent notified the Union by letter dated December 27, 1993, that it did not consider itself subject to binding arbitration without a new collective-bargaining agreement. Thus, the Respondent's reliance on the Board's decision in *Goya Foods*, 238 NLRB 1465 (1978), is misplaced. In *Goya*, the discharge issue was indisputably subject to arbitration and the employer in that case, unlike the Respondent here, had not disavowed its obligation to process the grievance through binding arbitration.

I find that the strike that commenced on March 9, 1994, was an unfair labor practice strike and that the Respondent's failure immediately to reinstate employees on their unconditional offer to return to work on April 1, 1994, violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Burns International Security Service, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing holiday pay for employees on workers' compensation leave, without notice to the Union and an opportunity to bargain.

[8] The Respondent also relies on *Typoservice Corp*., 203 NLRB 1180 (1973), for the proposition that the unfair labor practice was too remote in time to be a cause of the strike. In *Typoservice* the unfair labor practices alleged to be a cause of the strike consisted of threats and promises to employees, most of which occurred more than a month before the strike. In this case, by contrast, the unilateral discontinuance of holiday pay for employees on workers' compensation was a continuing violation. As far as the record shows, the Respondent not only failed to pay holiday pay for Thanksgiving 1993 but for every holiday thereafter. On these facts, the Respondent's unfair labor practice was not too remote in time to be a cause of the strike.

[9] The Respondent relies, inter alia, on *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), to support its contention that the strike was purely economic. In *Soule*, the First Circuit overturned the Board's decision that the strike at issue was an unfair labor practice strike. That case is distinguishable from the instant matter because in *Soule*, as the court pointed out, there was a lack of evidence that the unfair labor practice issues had been discussed prior to the strike or that they were publicized during the strike. Here, as noted above, there is considerable evidence that the employees discussed the unilateral change prior to the strike and that this unfair labor practice was publicized in union picket signs, flyers, and press releases.

3. The strike which began on March 9, 1994, was caused in part by the unfair labor practice set forth above and was therefore an unfair labor practice strike.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by, on or about April 1, 1994, failing and refusing immediately to reinstate employees to their former positions of employment on their unconditional offer to return to work on April 1, 1994.

5. The above violations constitute unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that the Respondent be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully eliminated holiday pay for employees on workers' compensation leave without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this change, must make whole for loss of pay employees who failed to receive holiday pay because they were receiving workers' compensation benefits, commencing with the Thanksgiving holiday in November 1993 to the present time. Backpay shall be determined at the compliance stage. Any backpay found to be due shall be computed in accordance with the formula set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), and shall include interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having failed immediately to reinstate strikers when they made an unconditional offer to return to work on April 1, 1994, must offer immediate reinstatement to any employees who have not yet been returned to work to their former positions or, if such positions no longer exist, to substantially equivalent positions, without impairment of their seniority and other rights and privileges, dismissing if necessary, any persons hired as replacements. The Respondent shall make the strikers whole for any loss of earnings they may have suffered by reason of the Respondent's refusal to reinstate them, by paying to each of them a sum of money equal to that which they normally would have earned during the period from 5 days after the date on which they applied for reinstatement to the day of the Respondent's offer of reinstatement. Backpay shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Burns International Security Services, Rowe, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making changes in the employees' wages, hours, or working conditions without affording the Union notice and an opportunity to bargain and otherwise failing to bargain in good faith.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all employees who were denied holiday pay by reason of the Respondent's unlawful unilateral discontinuance of holiday pay to employees on workers' compensation leave, commencing with the Thanksgiving holiday in November 1993.

(b) Within 14 days from the date of the Board's Order, offer full reinstatement to all employees who have not yet been returned to their former jobs or, if these jobs no longer exit, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing if necessary, any persons hired as replacements.

(c) Make whole all former strikers for any loss of earnings and other benefits suffered as a result of the failure to immediately reinstate them upon their unconditional offer to return to work on April 1, 1994, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Rowe, Massachusetts, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 21, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint in Case 1–CA–31780 be dismissed insofar as it alleges a violation of the Act not specifically found.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to give the Union notice and an opportunity to bargain over any proposed changes in wages, hours, or terms or conditions of employment or otherwise fail to bargain in good faith with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all employees who were denied holiday pay by reason of our unlawful unilateral discontinuance of holiday pay to employees on workers' compensation leave, commencing with the Thanksgiving holiday in November 1993.

WE WILL offer immediate and full reinstatement to all strikers who made an unconditional offer to return to work on April 1, 1994, and have not yet been returned to their former jobs, or if those jobs no longer exits, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed by them.

WE WILL make all former strikers whole for any loss of earnings resulting from our failure to reinstate them on April 1, 1994, less any net interim earnings, plus interest.

BURNS INTERNATIONAL SECURITY SERVICES